RECORD
AND
BRIEFS

No. 13-946

Supreme Court, U.S.
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In the Supreme Court of the United States

RAUL LOPEZ, WARDEN, *Petitioner,*

v.

MARVIN VERNIS SMITH, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit failed to apply the deferential standard of review required by 28 U.S.C. § 2254(d) when it granted federal habeas relief from a state murder conviction on the ground that the prosecutor's request for an aiding-and-abetting instruction at the jury-instruction conference violated a putative constitutional right to prior notice of the government's theory of prosecution—a right that has been recognized in the court of appeals' own precedents, but not established by any holding of this Court.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Warden Raul Lopez, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENT BELOW

The opinion of the court of appeals (Appendix A) is reported at 731 F.3d 859. The judgment of the district court (Appendix B) and the magistrate judge's report and recommendation (Appendix D) are unpublished. The California Court of Appeal's initial reversal of respondent's conviction (Appendix E), the California Supreme Court's order remanding the case for reconsideration (Appendix F), and the court of appeal's affirmance of the conviction on reconsideration (Appendix G) are also unpublished.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 23, 2013. Appendix A. A petition for rehearing and rehearing en banc was denied on November 8, 2013. Appendix I. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. a. In December 2005, respondent Smith summoned the police to his home, where Smith's elderly wife had been bludgeoned to death with a fireplace log turner. The police saw no signs of forced entry. Smith volunteered that there should be jewelry in a bedroom safe, but the police discovered the safe unlocked and empty. After further investigation, the police arrested Smith for the murder of his wife. In Smith's car they found both the "stolen" jewelry and duct tape matching a strip found near the body. Appendix G at 76-79.

The State filed an information charging that "[o]n or about December 15, 2005, in violation of Section 187(a) of the Penal Code (MURDER), a FELONY, MARVIN VERNIS SMITH did unlawfully and with malice aforethought kill MINNIE SMITH, a human being." CT 103. Under California law, that statement was sufficient to put at issue all potential theories of liability, including aiding and abetting. *See, e.g.*, Cal. Penal Code § 971; *People* v. *Diaz*, 3 Cal.

4th 495, 557, 834 P.2d 1171, 11 Cal. Rptr. 2d 353 (1992).

At a preliminary hearing, a detective testified that an informant had told police that, while jailed and awaiting trial, Smith had acknowledged that he wanted "to get rid of" his wife and that he left the house unlocked on the day of the murder after staging it to look like a robbery scene. As related by the detective, the informant said that Smith never told him who had committed the murder, how it had been committed, or whether it had been committed before Smith left the house. Appendix G at 86-87.

During opening statements in the trial, defense counsel informed the court that she had received word that the informant would refuse to testify. RT 331-33. The trial court ordered the parties not to refer to the informant's potential testimony during opening statements. RT 424.

In his opening statement, the prosecution told the jury that the State's evidence would show that Smith had bludgeoned his wife to death with the fireplace log turner. Appendix G at 80; RT 300. In its case in chief, the State produced the testimony of police officers describing what they had discovered, and what Smith had said to them, at the crime scene and in Smith's car. The prosecution also presented expert testimony that Smith's home had been staged to make it appear that his wife had been killed in a home-invasion robbery. There was also evidence that Smith had cavorted with other women, and that he had said his wife would have to "die" rather than take half of his property in a divorce. Appendix G at 77-79.

In its case, the defense presented testimony from neighbors, workers at a property owned by Smith, and staff at a medical center where Smith had an appointment, along with cellphone records and

receipts, to establish that Smith was elsewhere around town on the day of the murder. An orthopedic surgeon testified that Smith could not possibly have struck the fatal blows, because he had recently undergone shoulder surgery that made it physically impossible for him to have wielded the fireplace tool with sufficient force to kill his wife. The defense also presented a police interview of one of Smith's co-worker's, who suspiciously seemed to know unpublicized details about the crime—thus suggesting that he, rather than Smith, might have been the murderer. Appendix G at 79-80. The prosecutor did not call the informant whose statements had been related at the preliminary hearing, either in its case in chief or in rebuttal. Appendix G at 87.

During the jury-instruction conference, the prosecution requested a standard instruction that Smith might be guilty as an aider and abettor even if someone else had physically struck the fatal blow. Appendix G at 80. Smith objected, arguing that the prosecutor had not previously indicated that he would offer the jury an aiding-and-abetting theory, and that there was no evidence to support conviction on that basis. The court agreed to give the instruction, explaining that "considerable evidence" had been presented by both sides as to whether Smith had the physical ability to use the murder weapon, that there was likewise considerable evidence that Smith was involved in the murder, and that the instruction would guide the jurors if they believed that Smith had been involved in the crime even if he had not personally wielded the murder weapon. Appendix E at 66. Defense counsel did not ask to reopen the defense case to present evidence responsive to the aiding-and-abetting theory, or for a continuance to allow it to adjust its closing argument. Instead, the

instruction conference took place in the morning, and closing arguments began after a lunch recess. RT 2896-97, 2901.

During his opening summation, the prosecutor argued only that Smith was the murderer; he did not refer to an aiding-and-abetting theory at all. In her responsive argument, however, defense counsel predicted that the prosecutor would argue for the first time in rebuttal that a second person had been involved in the murder. She argued that the jury should reject any such theory because there was no evidence to support it. RT 3055. In rebuttal, the prosecutor again maintained that it was Smith himself who bludgeoned his wife to death. He noted, however, that if the jury disagreed with that position, it could still find Smith guilty if it found that that he had aided and abetted another perpetrator. RT 3111-12.

The jury convicted Smith of first degree murder, and the trial court sentenced him to 25 years to life in prison. Appendix G at 76.

b. The California Court of Appeal initially reversed. Appendix E. It held that the trial court had erred in giving an aiding-and-abetting instruction, because there was insufficient evidence to support conviction on that basis, and that the error required reversal. *Id.* at 66-72.

The California Supreme Court ordered the Court of Appeal to reconsider whether the instructional error was harmless in light of *People* v. *Guiton*, 4 Cal. 4th 1116, 847 P.2d 45, 17 Cal. Rptr. 2d 365 (1993). Appendix F. *Guiton* held that an error in instructing the jury on an alternate theory of guilt that is not supported by the evidence requires reversal only if the record affirmatively demonstrates a

reasonable probability that the jury relied solely on that theory in finding the defendant guilty.

c. On remand, the Court of Appeal affirmed Smith's conviction. It held that the trial court's error in giving an aiding-and-abetting instruction was harmless because the record did not affirmatively demonstrate the jury had relied on it. Indeed, the prosecutor had specifically argued in closing that the State's theory of the case was that Smith had committed the murder himself. Appendix G at 80-83.

The Court of Appeal then addressed Smith's further claim, previously unresolved, that he had been deprived of due process because the prosecution had requested an aiding-and-abetting instruction at the jury-instruction conference, without having indicated at any earlier point that it would advance such a theory. Smith argued that this "ambush" deprived him of a fair opportunity to prepare his defense. Appendix G at 85.

In rejecting this claim, the Court of Appeal recognized that "[b]oth the Sixth Amendment of the federal constitution and the due process guarantees of the state and federal constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them." Appendix G at 86. It observed (*id.*), however, that state law specifically provides that all persons defined by state law as "principals" in the commission of a crime—which includes aiders and abettors—are to be "prosecuted, tried and punished as principals," and that "no other facts need be alleged in any accusatory pleading against any such person than are required in an accusatory pleading against a principal." Cal. Penal Code § 971; *see id.* § 31 (defining "principals"). State cases likewise make clear that an accusatory pleading charging a

defendant with murder need not specify any particular theory on which the prosecutor intends to rely. Appendix G at 86, citing *People* v. *Diaz*, 3 Cal. 4th 495, 557, 834 P.2d 1171, 11 Cal. Rptr. 2d 353 (1992). The Court of Appeal concluded that the information charging Smith with murder provided constitutionally adequate notice that he might have to defend against all available theories of the crime. It further noted that, if any additional notice were required, Smith received it at his preliminary hearing, because the potential testimony from an informant described at that hearing suggested that Smith might have used an accomplice to carry out the crime. Appendix G at 85-89.

The California Supreme Court denied Smith's petition for further review.

2. Smith then filed a federal petition for habeas corpus, raising the same claim that he had been deprived of due process because he received inadequate notice that the prosecution might seek to rely on an aiding-and-abetting theory.

a. The district court concluded that Smith was entitled to relief. Appendix D. The court acknowledged that the State's charging document gave Smith notice that he might have to defend against all theories of murder, including aiding and abetting. *Id.* at 48. It reasoned, however, that that initial notice had been "abrogated" by two subsequent events: the trial court's direction that the parties were not to discuss the informant's potential testimony in their opening statements at trial, and the prosecutor's ultimate decision not to call the informant as a witness. *Id.* at 51. The court observed that it was possible Smith might have tried his case differently had he been notified of the aiding-and-abetting theory earlier, and that in the court's

estimation the evidence was closely balanced, leaving the court with "real doubts about the validity of the jury's verdict here." *Id.* at 57-58.

b. The court of appeals affirmed. Appendix A.

(i) At the outset of its analysis, the court correctly stated the deferential standard of review established by 28 U.S.C. § 2254(d). Appendix A at 13. Under that standard, the federal courts would be authorized to grant habeas relief only if the state courts' rejection of Smith's claim "was contrary to, or an unreasonable application of, clearly established Federal law" as determined by this Court, or "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

Having articulated that standard, the court of appeals first cited three of this Court's cases for the general proposition that the Constitution guarantees a criminal defendant the right "to be informed of the nature and cause of the accusations against him so that he may have a meaningful opportunity to prepare an adequate defense[.]" Appendix A at 14, citing *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *In re Oliver*, 333 U.S. 257, 273 (1948); and *Russell* v. *United States*, 369 U.S. 749, 766-68 (1962). In the next sentence, it cited four of *its own* prior cases for a much more restrictive proposition: "Therefore, *we* have repeatedly recognized that a defendant who is charged with first-degree murder is entitled to notice of what *specific theory* of murder the prosecution intends to pursue." Appendix A at 14-15 (emphasis added), citing *Murtishaw* v. *Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2001); *Morrison* v. *Estelle*, 981 F.2d 425, 428 (9th Cir. 1992); *Sheppard* v. *Rees*, 909 F.2d 1234, 1235 (9th Cir. 1990); and *Givens* v. *Housewright*, 786 F.2d 1378, 1380-81 (9th Cir. 1986).

The court then focused its discussion on *Sheppard* v. *Rees*, in which a prior panel had accepted a government concession of a due process violation where the prosecution had never mentioned a felony-murder theory, directly or indirectly, during any pretrial or trial proceedings, but then requested a felony-murder instruction after the instruction conference and immediately before closing arguments. Appendix A at 16. The court acknowledged that *Sheppard* was a "'narrow ruling,'" issued before federal habeas review was substantially narrowed by the Antiterrorism and Effective Death Penalty Act (AEDPA), and that even the Ninth Circuit itself had previously "distinguished it where the facts of a case varied even slightly." *Id.* at 17. In the court's view, however, *Sheppard*'s specific holding had "faithfully applied the principles enunciated by [this] Court in *Cole*, *Oliver*, and *Russell*." *Id.* And Smith's case, the court concluded, was "indistinguishable from *Sheppard*." *Id.*

In reaching that conclusion, the court acknowledged that the charging document in this case "was initially sufficient to put [Smith] on notice that he could be convicted either as a principal or as an aider-and-abettor." Appendix A at 17. As the court viewed the record, however, "the prosecution's conduct throughout the pretrial and trial proceedings affirmatively led Smith to reasonably believe that it would not rely on an aiding-and-abetting liability theory." *Id.* at 18. Indeed, "as the California Court of Appeal recognized, the prosecution presented *no evidence* at trial to support an aiding-and-abetting theory." *Id.* at 19 (emphasis in original). The court rejected the argument that the defense's own evidence, focused on suggesting the possibility of a different perpetrator, itself suggested the possibility of

an aiding-or-abetting theory (*id.* at 20); and it termed "puzzling" the state Court of Appeal's similar observation about the potential informant testimony explored at the preliminary hearing (*id.* at 21). Instead, the court reasoned, the prosecution tried its case on a direct-perpetration theory; presented "no evidence" in support of an aiding-and-abetting theory; and then "'ambushed'" Smith by seeking an aiding-and-abetting instruction. *Id.* at 21-22. That course of conduct deprived Smith of his "fundamental right to notice of the nature of the accusations against him ... in violation of *Cole*, *Oliver*, and *Russell*." *Id.* at 22.

(ii) Having concluded that the course of the trial in this case had deprived Smith of fair notice under *Sheppard*, the court of appeals briefly considered the question of harmless error. Appendix A at 22-23. The court's two-paragraph analysis focused, however, not on any specific harm that might have been caused by late notice of the availability of aiding-and-abetting as a secondary theory of liability, but on whether the giving of the aiding-and-abetting instruction itself had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 22 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993)). With no analysis of what, if anything, defense counsel might have done differently if provided with more notice of a possible aiding-and-abetting theory, the court expressed its view that the evidence in the case was "evenly balanced," and thus that "the fact that the prosecutor invited the jury to speculate—at the last minute and without any evidence—about Smith's liability as an aider and abettor" was enough to lead to "grave doubts about the validity of the jury's verdict." *Id.* at 23.

(iii) In the last section of its opinion, the court considered "whether § 2254(d) bars habeas relief." Appendix A at 23. In that regard, the court reasoned that there is no AEDPA bar where a state court's decision is "'based on an unreasonable determination of the facts' in light of the record before the state court." 28 U.S.C. § 2254(d)(2). Here, the court held, the California Court of Appeal based its rejection of Smith's claim on two "unreasonable" factual findings: (i) that the informant's preliminary hearing testimony "'meaningfully apprised [Smith] of the potential for an aiding and abetting theory,'" and (ii) that, on the facts here, the request for an aiding-and-abetting instruction came during the general jury instruction conference and "'not just prior to closing argument'" as in *Sheppard*. Appendix A at 23-24 (emphasis omitted). This two-paragraph analysis under Section 2254(d)(2) apparently provides the court's primary justification for its ruling.

As the court acknowledged (Appendix A at 24), the State also argued that any grant of relief would violate Section 2254(d)(1). The California Court of Appeal concluded that any error related to the giving of an aiding-and-abetting instruction was harmless in light of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), and the California Supreme Court's parallel holding in *People* v. *Guiton*, 4 Cal. 4th 1116 (1993). Appendix A at 24-26. Those cases hold that where an alternative theory of liability is submitted to the jury without adequate factual support, an ensuing conviction should nonetheless be sustained unless review of the record establishes a reasonable probability that the jury actually relied solely on the unsupported theory. *See id.* at 24. Here, the state Court of Appeal reviewed the record and held there was no indication that the jury relied on

any aiding-and-abetting theory. The State argued that there was no basis for a federal court to conclude under Section 2254(d)(1) that that conclusion was "contrary to" or "an unreasonable application of" federal law clearly established by this Court. On the contrary, under the reasoning of *Griffin* and *Guiton*, there could be no harm to Smith from any error related to aiding and abetting—including any putative notice error—if, as Smith had successfully argued (and the Ninth Circuit itself repeatedly stated), the record was devoid of any evidence to support any such theory in the first place.

The Ninth Circuit rejected that contention. Appendix A at 24-26. Although its own harmless-error analysis a few paragraphs earlier focused entirely on the strength of the proof against Smith and the chance that the jury might have been misled by an instruction and alternative argument on aiding-and-abetting, here the court accused the State of "conflat[ing] two fundamentally different inquiries"—possible harm from the notice error and possible effect of the aiding-and-abetting theory on the jury's verdict. *Compare* Appendix A at 22-23 *with id.* at 24-25. The notice issue, the court reasoned, was "separate [from] and unrelated to the question of whether a factually unsupported jury instruction, by itself, requires reversal." *Id.* at 26. And because the issue addressed by the state Court of Appeal was different from the question of notice, the federal court was "not constrained by § 2254(d)(1) in deciding that the trial court's error in this case was not harmless." *Id.* at 26.

c. The court of appeals denied rehearing and rehearing en banc. Appendix I.[1]

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[1] The district court has granted the State's request for a (continued...)

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit set aside Smith's state murder conviction without any demonstration that the state courts' treatment of his notice claim was contrary to a rule of federal law clearly established by decisions of this Court—let alone that it was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786-87 (2011); 28 U.S.C. § 2254(d). In identifying purported constitutional error in Smith's trial, the court of appeals cited this Court's precedents only for general principles of fair notice, while looking onto its own prior cases in deciding how those principles should be applied in the context of particular cases. That approach is indistinguishable from *de novo* review on direct appeal, and wholly inconsistent with the limited scope of federal habeas review under 28 U.S.C. § 2254(d) after AEDPA. It is fundamental error of a sort that this Court has repeatedly and forcefully condemned. *See, e.g.*, *Nevada* v. *Jackson*, 133 S. Ct. 1990 (2013) (*per curiam*); *Marshall* v. *Rodgers*, 133 S. Ct. 1446 (2013) (*per curiam*); *Carey* v. *Musladin*, 549 U.S. 70 (2009); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (*per curiam*); *Renico* v. *Lett*, 559 U.S. 766 (2010).

The Ninth Circuit's published opinion in this case will subject state criminal convictions throughout its jurisdiction to collateral attack based on that

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(...continued)
stay of its mandate (directing retrial) pending the conclusion of proceedings in this Court.

court's views of what constitutes fair notice of the government's specific theories of prosecution, and of how even initially adequate notice may be vitiated based on inferences from government actions or silence on particular issues between the filing of a charge and the formulation of jury instructions. That result is not required by any decision of this Court, and thus cannot be reconciled with AEDPA. More generally, this is another in a line of cases in which States have had to ask this Court to instruct the courts of appeals concerning the proper limits of federal habeas review after AEDPA. As in many other such instances, the failure to observe those limits here is clear on the face of the record, and the Court may wish to consider summary reversal.

1. The California Court of Appeal fairly adjudicated and rejected Smith's notice claim. In doing so, it clearly identified the principles of fair notice clearly established by the federal Constitution and decisions of this Court. *See* Appendix G at 86. It explained that, under California law, a criminal information charging Smith with murder was adequate to put him on notice that he might need to defend against an aiding-and-abetting theory of liability—a point conceded by the Ninth Circuit. *Id.*; *see* Appendix A at 17. The state court also explained why, in its judgment, Smith remained on notice of that possibility throughout the proceedings against him. Appendix G at 86-89.

Section 2254(d) and this Court's cases set narrow bounds for federal collateral review of such a state court adjudication. As this Court has explained, a federal court must first determine what arguments or theories support the state court's decision. The question then is only whether the state decision is contrary to, or an unreasonable application of, federal

law as clearly established by this Court. That is, the only question the federal court may ask is "whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holdings in a prior decision of this Court." *Harrington* v. *Richter*, 131 S. Ct. at 786.

That is not how the Ninth Circuit proceeded in this case. To be sure, at the outset of its discussion the court pointed to general principles of fair notice that have been articulated in decisions of this Court. Appendix A at 14. This Court has said—and the State does not dispute—that "notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1968); accord *Russell* v. *United States*, 369 U.S. 749, 766-68 (1962) ("[n]otice must be sufficiently detailed to enable a defendant to address all the relevant issues in his defense"); *In re Oliver*, 333 U.S. 257, 273 (1948). Neither those general principles, however, nor the particular facts and holdings of this Court's cases, come close to dictating the result in this case.

In *Cole*, for example, the defendants were charged by information with violating § 2 of an Arkansas statute. *Cole*, 333 U.S. at 197-98. On appeal, however, the state Supreme Court upheld the convictions under § 1—a "separate, distinct, and substantially different offense." *Id.* at 200-01. This Court held that the convictions could not be sustained on the basis of an offense for which the defendants had never been tried. In *Russell*, the Court reasoned that defendants could not be prosecuted under 2 U.S.C. § 192 for refusing to answer questions before a congressional committee where the indictment did not

identify the subject under investigation. 369 U.S. at 767-68. In *Oliver*, a judge charged the defendant with criminal contempt, and immediately found him guilty, based on alleged perjury during secret grand jury proceedings. 333 U.S. at 257. This Court held that that course of proceedings violated the defendant's basic rights to notice of the charges against him, to have a reasonable opportunity to prepare a defense, to have counsel, to testify, and to call witnesses. *Id.* at 275.

None of these situations bears any resemblance to the facts of this case. Nor, indeed, did the court of appeals discuss the factual settings of the cases it cited from this Court, or attempt to explain why their actual holdings controlled the result in this case. It relied instead on the facts and holdings of *its own* prior cases applying general notice principles to specific situations. Those cases, the court explained, had "repeatedly recognized that a defendant who is charged with first-degree murder is entitled to notice of what specific theory of murder the prosecution intends to pursue." Appendix A at 14-15 (citing *Sheppard* v. *Rees*, 909 F.2d 1234, 1235 (9th Cir. 1990); *Murtishaw* v. *Woodford*, 255 F.3d 926, 953-54 (9th Cir. 2001); *Morrison* v. *Estelle*, 981 F.2d 425, 428 (9th Cir. 1992); and *Givens* v. *Housewright*, 786 F.2d 1378, 1380-81 (9th Cir. (1986)). Moreover, the court here further narrowed that rule to hold that even after proper notice has been given in a charging document, it can be negated based on inferences from the prosecution's later conduct during pretrial or trial proceedings. Appendix A at 16-22. That is the rule the court ultimately relied on as a basis for granting a federal writ in this case.

Neither of these propositions follows necessarily from any holding of this Court. Accordingly, the Ninth Circuit's reliance on them to reverse a state court judgment was improper as a matter of AEDPA habeas review. Just last year, reversing the Ninth Circuit in *Nevada* v. *Jackson*, 133 S. Ct. at 1993-94, this Court admonished again that Section 2254(d) requires federal habeas courts to identify and apply only controlling constitutional "holdings" of this Court. "[C]learly established Federal law, as determined by the Supreme Court" refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer* v. *Andrade*, 538 U.S. 63, 71 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). Lower courts may not point to general statements in this Court's cases and infer or extrapolate a basis for setting aside a state court judgment. Before a federal writ may be granted, this Court itself must have "squarely" established the specific rule at issue. *Harrington* v. *Richter*, 131 S. Ct. at 786; *Knowles* v. *Mirzayance*, 173 L. Ed. 2d 251 (2009); *Carey* v. *Musladin*, 549 U.S. at 75-76; *Wright* v. *Van Patten*, 522 U.S. 120, 126 (2008) (*per curiam*). Indeed, this Court must have applied the rule in the same "context" as that in which the habeas petitioner's claim arises. *Premo* v. *Moore*, 131 S. Ct. 733, 743 (2011); *Carey* v. *Musladin*, 549 U.S. at 75-76; *see Yarborough* v. *Alvarado*, 541 U.S. 652, 660-61, 663-64 (2004).

By the same reasoning, when undertaking collateral review of state court judgments, a federal court may not treat its own precedents as substitutes for, or supplements to, this Court's holdings. Circuit precedent is not "clearly established Federal law" for purposes of Section 2254(d)(1). *See Nevada* v.

Jackson, 133 S. Ct. at 1994; *Marshall* v. *Rodgers*, 133 S. Ct. at 1450-51; *Parker* v. *Matthews*, 132 S. Ct. at 2155; *Carey* v. *Musladin*, 549 U.S. at 77; *Knowles* v. *Mirzayance*, 129 S. Ct. 1411, 1419 (2011); *Renico* v. *Lett*, 130 S. Ct. at 1865-66; *Kane* v. *Garcia-Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*); *accord*, *Wright* v. *Van Patten*, 552 U.S. at 125-126. In *Parker* v. *Matthews*, for example, this Court bluntly observed that it was "plain and repetitive error for the Sixth Circuit to rely on its own precedents in granting Matthews habeas relief." 132 S. Ct. at 2155-56.

Yet, that is exactly what the Ninth Circuit did here. Tellingly, the panel cited, as the fundamental if not sole basis for its holding, its conclusion that "[t]his case is indistinguishable from *Sheppard*"—a Ninth Circuit decision. Appendix A at 17. Whether or not this case is distinguishable from circuit precedent is not the question on habeas review. What the court's statement puts into sharp relief is that its method of analyzing this case was indistinguishable from what it would have done on direct or *de novo* review. As in *Richter*, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." 131 S. Ct. at 786.

The Ninth Circuit agreed with the California Court of Appeal that the general murder charge lodged against Smith gave him constitutionally adequate notice of a possible aiding-and-abetting theory of liability. No decision of this Court clearly establishes the proposition that such notice, once properly given, could be negated later based on inferences from the conduct of the prosecution before or during trial. Certainly *Cole*, *Russell*, and *Oliver* do not establish any such rule, either in general or in the specific context presented by the facts of this case. Moreover, under AEDPA, the "only question that

matters" is "not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro* v. *Landrigan*, 550 U.S. 465, 473 (2007); *Lockyer* v. *Andrade*, 538 U.S. at 71. Yet, the court below never considered whether, even under such a rule, reasonable jurists on the California Court of Appeal could have concluded, as they did, that Smith was *not* denied fair notice on the facts of this case. *See Harrington* v. *Richter*, 131 S. Ct. at 786. In fact, all the court of appeals here really decided was that, applying its own precedents to the facts in Smith's case, it would have reached a different result. That approach to federal habeas review was manifestly improper under AEDPA.

2. The court of appeals also erred in concluding (Appendix at 22-23) that any notice error was prejudicial. In one cursory paragraph, the court cited comments by the state court for the proposition that the evidence against Smith was "evenly balanced," and abruptly concluded that it had "grave doubts" about the jury's verdict in light of the "the fact that the prosecutor invited the jury to speculate—at the last minute and without any evidence—about Smith's liability as an aider and abettor." *Id.* at 23. The court did not explain, however, what any of this had to do with the potential effect of an alleged error in providing Smith with *notice* of an aiding-and-abetting theory—as opposed to the effect of the error identified by the state courts in instructing the jury on aiding and abetting and allowing the prosecutor to argue that theory at all. Nor did it explain what it thought defense counsel would or could have done differently if she had received earlier *notice* of the aiding-and-abetting theory. And that is not surprising, because defense counsel also never explained, either to the

state courts or in Smith's briefs to the Ninth Circuit, what the defense would have done differently if it had received more notice. Indeed, at the time the issue first arose, counsel objected to the giving of an aiding-and-abetting instruction, but did not request a continuance to revise her closing argument when that objection was overruled, or move to reopen Smith's case to present any additional evidence, or lodge any new objection to the State's evidence in light of the potential alternative ground for conviction. Instead, she did the most effective (and perhaps only) thing that she could have done to combat an aiding-and-abetting theory, no matter how much notice was involved: She argued to the jury that there was no evidence to support it.

That is particularly important because Smith also made that argument on his direct appeal in state court, where he *prevailed as a matter of law*. The state courts agreed with Smith that there was no evidence to support an aiding-and-abetting theory, and that the court should not have instructed on it. They held that error to be harmless, based on cases from this Court and the California Supreme Court holding that, where an alternative theory is argued to the jury but there is insufficient evidence to support it, the jury is presumed to have relied on another ground to convict unless there is some affirmative indication to the contrary in the record. *See* Appendix G at 81-83. For present purposes, the main point is that, although the State has always maintained there was enough evidence to permit instructing the jury on an aiding-and-abetting theory, the state and federal courts have all agreed with Smith that the theory was submitted to the jury "without any evidence" to support it. *E.g.*, Appendix A at 23. If that is true, then there is no ground for

concluding that the jury relied on a wholly unsupported theory, or that anything about that theory—the decision to instruct on it, or the amount of time that defense counsel had to prepare to meet it—made any difference to the outcome of Smith's trial. And surely there was no ground for the Ninth Circuit to grant federal habeas relief in the face of the state Court of Appeal's express conclusion that the record provided no basis for concluding that the jury actually relied on the aiding-and-abetting theory in any respect.

3. The court of appeals sought to justify its result under AEDPA on the ground that the state Court of Appeal's judgment rested on two "unreasonable determination[s] of the facts" (28 U.S.C. § 2254(d)(2)): (1) that preliminary hearing testimony concerning a possible informant witness had meaningfully apprised Smith of the possibility of an aiding-and-abetting theory and (2) that the prosecutor's request for an aiding-and-abetting instruction came in advance of closing arguments, so that defense counsel had adequate time to prepare a response. Appendix A at 23-24. That reasoning is unsustainable.

First, these determinations were hardly findings of historic fact of the sort that Congress had in mind in framing Section 2254(d)(2). They are more legal or mixed questions concerning whether undisputed historical facts support legal conclusions of fair notice or unfair surprise. *See generally Thompson* v. *Keohane*, 516 U.S. 99, 110-11 (1995). If the court of appeals wished to question such conclusions, it was required to do so under the stringent standards applicable to the review of state courts' legal conclusions under Section 2254(d)(1).

Second, the two "findings" cited by the court of appeals would be material only if one accepted the court's legal premises (i) that there is a "clearly established" federal rule that proper notice in a charging document may be superseded by inferences from the prosecutor's later conduct and (ii) that an error involving late notice of an alternative theory of liability could be harmful even where the courts and the defendant all agree that there was never any evidence to support that theory. Those premises are unsound for the reasons set out above.

Finally, even if the two propositions identified by the court of appeals were material factual findings by the state Court of Appeal, under AEDPA the federal courts were required to accept them as true unless Smith showed them to be false by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Smith made no such showing, and the court of appeals did not fairly analyze the "findings" for objective reasonableness under Section 2254(d)(2). Again, it merely substituted its own view of the facts, and their legal import, for the reasonable conclusions of the state court. See *Rice* v. *Collins*, 546 U.S. 333, 341-42 (2006).

4. This case should have resulted in a straightforward analysis and the denial of Smith's federal habeas petition. In rejecting Smith's notice claim, the state court correctly identified the controlling principles of federal law clearly established by this Court and reasonably applied them to the facts of the case. It properly held that the charging document provided Smith with notice that he could be required to defend against all theories of liability for murder, including aiding-and-abetting. It reasonably concluded that, if any further notice were required, Smith received it through the preliminary hearing. It

reasonably concluded that the prosecution did not unfairly "ambush" Smith by asking for an aiding-and-abetting instruction at the instruction conference—a conclusion bolstered by the fact that Smith's counsel did not request a continuance in light of the trial court's decision to give the instruction, and never articulated to the state courts any way in which his defense was actually adversely affected by the claimed lack of notice. And on the underlying issue of alleged error in giving the aiding-and-abetting instruction, the state court agreed with Smith that there was no evidence to support an aiding-and-abetting theory, and on that basis correctly concluded that giving the instruction was not reversible error. All these determinations were, at a minimum, reasonable applications of the law. In such circumstances, Section 2254(d) precludes federal courts from setting aside state convictions.

The Ninth Circuit's published decision in this case threatens to interfere with longstanding practices under state law. California (like many States) has never required an accusatory pleading to specify any particular theory of culpability. Nor has it required prosecutors to restate possible theories at unspecified intervals during the course of the prosecution, in order to avoid any implication that they have disclaimed a potential theory through a course of conduct or the presentation of evidence that would support other conclusions. Although the court of appeals accepted the permissibility of general pleading, its decision in this case will make prosecutions in California and elsewhere vulnerable, on direct appeal and on federal habeas review, to readily-framed claims that notice that was initially proper under a general charging document was later implicitly abrogated by some conduct by prosecutors,

judges, witnesses, or even defense counsel during the course of the proceedings.

More generally, however, the case warrants intervention by this Court because it is another instance in which the court of appeals has plainly failed to abide by the restrictions that Congress has placed on federal habeas review of state convictions—and by this Court's repeated opinions interpreting and enforcing those restrictions. Last Term, this Court reversed three Ninth Circuit judgments (two of them summarily) based on similar misapplications of AEDPA's highly deferential standard of review.[2] The 2010 Term saw four such reversals.[3] In the last decade, the Court has reversed twenty-three Ninth Circuit judgments on similar grounds, nine of them in *per curiam* opinions.[4] In the same period, the Court

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[2] *Johnson* v. *Williams*, 133 S. Ct. 1088 (2013); *Marshall* v. *Rodgers* 133 S. Ct. 1446 (2013) (*per curiam*); *Nevada* v. *Jackson*, 133 S. Ct. 1990 (2013) (*per curiam*).

[3] *Premo* v. *Moore*, 131 S. Ct. 733 (2011); *Harrington* v. *Richter*, 131 S. Ct. 770 (2011); *Felkner* v. *Jackson*, 131 S. Ct. 1305 (2011) (*per curiam*); *Cullen* v. *Pinholster*, 131 S. Ct. 1388 (2011).

[4] In addition to the cases cited in footnotes two and three, *see Cavazos* v. *Smith*, 132 S. Ct. 2 (2011) (*per curiam*); *McDaniel* v. *Brown*, 558 U.S. 120 (2010) (*per curiam*); *Waddington* v. *Sarausad*, 555 U.S. 179 (2009); *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008); *Uttecht* v. *Brown*, 551 U.S. 1 (2007); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Knowles* v. *Mirzayance*, 556 U.S. 111 (2009); *Carey* v. *Musladin*, 549 U.S. 70 (2006); *Rice* v. *Collins*, 546 U.S. 333 (2006); *Kane* v. *Garcia Espitia*, 546 U.S. 9 (2005) (*per curiam*); *Brown* v. *Payton*, 544 U.S. 133 (2005); *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004); *Yarborough* v. *Gentry*, 540 U.S. 1 (2003) (*per curiam*); *Lockyer* v. *Andrade*, 538 U.S. 63 (2003); *Early* v. *Packer*, 537 U.S. 3 (2002) (*per curiam*); *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (*per*

(continued...)

has reversed more than twenty decisions of other Circuits, many again summarily, for the same kinds of failures.[5] Against this backdrop, the State respectfully suggests that in this case the court of appeals' failure to engage in properly restrained AEDPA review is once again clear, and once again merits either review or summary reversal by this Court.

(...continued)
curiam).

[5] See, e.g., *Burt* v. *Titlow*, 134 S. Ct. 10 (2013) (Sixth Circuit); *Metrish* v. *Lancaster*, 133 S. Ct. 1781 (2013) (Sixth Circuit); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012) (per curiam) (Sixth Circuit); *Howes* v. *Fields*, 132 S. Ct. 1181 (2012) (Sixth Circuit); *Wetzel v. Lambert*, 132 S. Ct. 1195 (2012) (*per curiam*) (Third Circuit); *Coleman* v. *Jackson*, 132 S. Ct. 2060 (2012) (*per curiam*) (Third Circuit); *Greene* v. *Fisher*, 132 S. Ct. 38 (2011) (Third Circuit); 132 S. Ct. 26 (2011) (Sixth Circuit) (*per curiam*); *Bobby* v. *Mitts*, 131 S. Ct. 1762 (2011) (Sixth Circuit) (*per curiam*); *Renico* v. *Lett* 559 U.S. 766 (2010) (Sixth Circuit); *Berghuis* v. *Thompkins*, 560 U.S. 370 (2010) (Sixth Circuit); *Berghuis* v. *Smith*, 559 U.S. 314 (2010) (Sixth Circuit); *Thaler* v. *Haynes*, 559 U.S. 43 (2010) (*per curiam*) (Fifth Circuit); *Wright* v. *Van Patten*, 552 U.S. 120 (2008) (*per curiam*) (Seventh Circuit); *Holland* v. *Jackson*, 542 U.S. 649 (2004) (*per curiam*) (Sixth Circuit); *Price* v. *Vincent*, 538 U.S. 634 (2003) (Sixth Circuit); *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (*per curiam*) (Sixth Circuit).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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